United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by
MICHAEL R. McGEE

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P/S

76-1445

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

vs.

GEORGE EDWARD MacINTYRE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF OF DEFENDANT-APPELLANT GEORGE EDWARD MacINTYRE

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STATUTES

INTRODUCTION

The defendant-appellant was indicted by a federal Grand Jury on June 19, 1974 for alleged violations of Title 18, United States Code Section 545 and of Title 19, United States Code Section 1461.

The indictment charged:

"On or about the 19th day of April, 1974 at the Lewiston Bridge, Lewiston, New York in the Western District of New York, George Edward MacIntyre fraudulently and knowingly did import and bring into the United States from Canada certain merchanidse, that is, approximatley 100 pounds of Canadian silver coins packaged in four bags having a face value of One Thousand Nine Hundred Ninety Nine Dollars and Eighty Cents ($1,999.80) contrary to law in that the coins were not unladened in the presence of and inspected by a customs officer at the first port of entry at which such merchandise arrived in the United States; all in violation of Title 19, United States Code, Section 1461 and Title 18, United States Code, Section 545."

Defendant-appellant made a pre-trial motion to dismiss the indictment on the grounds that the acts therein alleged do not constitute a violation of the statutes under which he has been charged. The Hon. Judge John T. Curtin subsequently on June 10, 1974 filed an order that the government had failed to face up to the fact that Section 1202 (5) (a) exempts from duty currency in current circulation in any country. However, on July 11, 1975 Judge John T. Curtin filed an order denying defendant's motion to dismiss.

Trial proceedings were subsequently held before the Honorable John T. Curtin, United States District Judge, and a jury, in Part I, United States Court House, Buffalo, New York, commencing on May 4, 1976.

On May 12, 1976 the defendant-appellant received a copy of the govern-

ment's request to charge the jury. On May 19, 1976 the defendant-appellant submitted his requests to charge. While the defendant did not object to Government's Request Number One (1) or Government's Request Number Two (2) he did object to parts of Government's Request's Number Five (5) and particularly objected to Government's Requests Three (3) and Four (4) and respectfully requested that defendant's requests (A) and (B) be given instead.

The basis for defendant's objection was the potential prejudicial effect the governments definition of "merchandise" could have upon the jury. Headnote Number Five (5) of Title 19 U.S.C. Section 1202 (tariff schedules) provides that ". . . currency (metal or paper) in current circulation in any country and imported for monetary purposes: is an 'intangible' and not subject to the provisions of the schedules." Defendant's objection was based on the fact that the government's charge requested that the court charge this headnote in connection with the definition of "merchandise". To do so, however, would serve to modify the "specific" statutory definition of "merchandise" by a "general" headnote and rule of interpretation of a customs regulation. In addition, the term "monetary purposes" is not even defined in the regulation. Despite the defendant's written objections to such a potentially prejudicial jury charge, and despite the oral renewal of defendant's objections (TR.106) the court denied the requests of the defendant (TR. 106).

Subsequently, the actual charge of the court went so far as to determine for the jury precisely when the coins were to be considered "merchandise" based on the "monetary purposes" standard, and on that standard alone. The court recited (TR. 141-142):

> "The term "merchandise" is defined in the statute as goods, wares or chattels of every description. I charge you in this case that these foreign coins, if they were brought

into the United States for normal use, that is, for money to purchase goods, then they are not considered as merchandise. If they were imported for the every day use as money, then they constitute an intangible under the law and do not constitute merchandise. Otherwise, if they are brought in for any other purpose, then they would be considered merchandise under the law." (emphasis supplied)

In essence the court's charge as such served to determine for the jury the vital issue of whether and when these Canadian coins constituted "merchandise". Such a charge was confusing to the jury and extremely prejudicial to the defendant's case which rested so heavily upon the jury's determination of this issue.

In keeping with the defendant's position, counsel for the defendant again excepted to the charge upon the completion of the same. (TR. 147-148).

On May 20, 1976 the jury found defendant-appellant George Edward MacIntyre guilty as charged in the indictment. On June 28, 1976 defendant was sentenced, and on July 1, 1976 the defendant filed his notice of appeal upon which the current appeal is brought.

POINT I

CANADIAN CURRENCY IS NOT "MERCHANDISE" AS USED IN EITHER 19 U.S.C. SECTION 1461 or 18 U.S.C. SECTION 545

The indictment of the appellant George Edward Mac Intyre under 18 U.S.C. Section 545 was based upon introducing "into the United States any merchandise which should have been invoiced." (emphasis added)

The indictment was further based on the charge that the appellant brought the Canadian coins into this country contrary to law in that he allegedly violated 19 U.S.C. Section 1461 which requires that "all merchandise imported or brought in from any contiguous country . . . shall be unladened in the presence of, and be inspected by a customs officer at the first point of entry . . ." (emphasis added)

Based upon the charges brought against the appellant it becomes an essential prerequisite to determine whether or not the appellant did, in fact, bring or import any "merchandise" into the United States. In order to secure a conviction for such acts the government would have to prove both the physical act of the unlawful importation of such "merchandise", as well as a knowing and willful intent to defraud the United States. See One Lot Emerald Cut Stones & One Ring v. United States, 409 US 232 (1927).

It is, therefore, imperative to first determine whether currency does, in fact, constitute "merchandise". For the purposes of Section 1461, Title 19 U.S.C. Section 1401 (c) presents a statutory interpretation of the definition of "merchandise" as "goods , wares and chattels of every description, and includes merchandise the importation of which is prohibited."

The government has interposed that the United States Customs Court has determined that courts may consult dictionaries in making their determina-

tion of the common meaning of a tariff term. E. Dillingham, Inc. v. United States, 358 F. Supp. 1295 (U.S. Customs Ct., 1973). This is precisely in conjunction with what the appellant has alleged throughout the proceedings. The terms included in the Section 1401 (c) definition of "merchandise" serve to bolster appellant's contentions.

"Wares" may be defined as "articles of merchandise or manufacture or goods." The New Century Dictionary 2174. "Chattels" are "property or goods"; and "goods" are defined as "articles of trade, wares or merchandise". The New Century Dictionary at 241 and 669.

If we are in fact to utilize the statutory definition of "merchandise" if becomes apparent that silver alloy coins of the 1950's and 1960's do not fit within the aforementioned dictionary definitions; nor does the common usage of these terms apply to silver coins. It should be noted that the United States Customs Court has also determined that where there is nothing to indicate what Congress intended a tariff term to mean, the term must be read and understood in accordance with its common meaning. Knowles Electronics v. United States, 371 F. Supp. 1393, aff'd 504 F. 2d 1403 (U.S. Customs Ct., 1973). It has further been determined that the classification of imported articles for custom duties purposes must rest upon its condition as imported. Carrington Co. v. United States, 497 F. 2d 902 (U.S. Court of Customs & Patent Appeals, 1974). It would be difficult to, therefore, suggest that all those persons entering the United States from Canada must present for inspection silver coins and proper money since "money" has never been contrued as fitting within the condition and common meaning of "merchandise". To determine otherwise would be analogous to determining that any individual carrying Canadian currency while crossing the border into the United States

would be subject to arrest and conviction for the failure to declare such currency as "merchandise".

So too at this juncture should the case of Lozano v. United States, 17 F. 2d 8 (5th Cir. 1927), cited by the government, be distinguished in this regard. Lozano is a 1927 case which dealt with a civil forfeiture action; the court therein reversed a directed verdict in favor of the government and sent the case back for a new trial; any statements therein with regard to "merchandise" were dicta and not necessary to the courts holding and the case has apparently never been cited or followed for such proposition in any reported decisions. Even more significant is the fact that the case deals with Mexican gold coins not in circulation in the United States, which is totally different from the case at bar. In the case at bar the Canadian coins involved herein are free from any duty and were still currently used as currency in circulation in both the United States and Canada. Government witnesses Ernest Lauffer (TR. 24) a customs inspector has verified that in this case there is no prohibition on importing these coins. This position was further supported by government witnesses David Wright, special agent with the United States Customs Service (TR. 52-53); John J. Forbes, special agent with the United States Customs Service (TR. 64-66); and William Van Neil, Special Agent with the United States Customs Service (TR. 89-91). The aforesaid individuals further helped to establish that the coins involved herein were still currently used as currency in both Canada and the United States.

Furthermore, a clear indication of violation is required for conviction under 18 U.S.C. Section 545. See U.S. v. Brodzik, 366 F. Supp. 295 (W.D. N.Y. 1973). Section 545 of Title 18 U.S.C. is clearly malum prohibitum, and as such, one is entitled to know with certainty the acts which constitute violation. To blindly accept the government's interpretation of when the term

"merchandise" encompasses "currency", would create a conflict with this principle of law. The courts are not obliged to define words and phrases which are not terms of art but have ordinary and understood meanings. U.S. v. Crockett, 506 F. 2d 759 (5th cir. 1974). As far back as 1811 in Citizen's Bank v. Nantucket, 5 Federal Cases 719 (1811) in a case involving money in bills, it was held that the term "merchandise" does not apply to paper money. Further, the term "merchandise" is often used to encompass only merchandise in the commercial sense; this is even to the exclusion of baggage, personal effects, etc. U.S. v. Mattio,17 F. 2d 879 (9th cir., 1927).

Appellant respectfully believes he has at least demonstrated herein that the points raised reflect the absence of clear expression of the acts forbidden in that currency is not "merchandise" as required by both 19 U.S.C. Section 1461 and 18 U.S.C. Section 545. By the malum prohibitum nature of the 18 U.S.C. 545 statute he is entitled to have knowledge of such.

Section 23.8 of the Customs Regulations states:

> "Action shall be taken under Section 545 Title 18 U.S. Code, only when there is a clear indication of a violation of some specific provision of law."

Footnote 16 following Section 23.8 states:

> " It is not necessary that the government shall have been deprived of duty to warrant a conviction of forfeiture under 18 U.S.C. Section 545. It need only be established that the "merchandise" has been fraudulently or knowingly introduced into the United States contrary to law". (emphasis added)

Therefore, despite the fact that an item is not subject to duty under the aforesaid regulation, it is nevertheless forfeitable. There is no statement made

with regard to criminal liability and apparently it is the intention of the statute to simply impress civil liability upon an individual who imports a non-dutiable item. Also, a thorough reading of the applicable case law indicates that the importance of the statute for criminal responsibility is directed toward individuals who illegally import items of contraband, e.g., narcotics, diamonds, whiskey, etc. Appellant respectfully submits that Canadian coins in current circulation are, however, clearly not contraband in and of themselves and that it is patently unclear from a reading of the statute as supplemented by Customs Regulations as to whether there is criminal responsibility for defendant appellant's technical omission in the absence of a determination that this currency clearly constitutes "merchandise" as used in either 19 U.S.C. Section 1467 or 18 U.S.C. Section 545.

POINT II

THE CHARGE OF THE COURT AND ITS FAILURE TO ALLOW THE APPELLANT TO HAVE PROPER REQUESTED INSTRUCTIONS PRESENTING HIS THEORY OF THE CASE GIVEN TO THE JURY WAS SO ERRONEOUS AND PREJUDICIAL AS TO CONSTITUTE REVERSIBLE ERROR

On May 12, 1976 the defendant-appellant received a copy of the government's request to charge the jury. In response thereto the defendant-appellant submitted his own written requests to charge on May 19, 1976.

The defendant-appellant had no objection to Government's Request Number One (1) or Government's Request Number Two (a). Defendant-appellant did however, object to Government Request Number Five (5), stating that it would be acceptable if the court deleted the following sentences:

> "The defendant's action could still be considered fraudulent even if such items were not subject to duty. It is the intent not to declare the merchandise which the law forbids and not the intent to evade paying duty."

While the case of U.S. v. McKee, 220 F. 2d 266 (2nd cir. 1955) held that "it is no longer necessary to show that the item or items introduced clandestinely into the United States were subject to duty," neither the case nor the statute itself ever spoke of "intent not to declare". The language objected to above, thus was repetitious and went far beyond the authority of McKee. Furthermore, even the government's case of Lozano v. U.S., 17 F. 2d 7, 8 (5th cir. 1927) found nothing wrong with "an intent not to declare".

The appellant respectfully submits that the most significant of the defendant's objections to the Government's Requests to charge were the objections to Government's Request Three (3) and Four (4) and the request that defendants requests (A) and (B) be given instead.

As has been previously noted, an essential element to the defense of the apellant was a clear, understandable, and unbiased instruction to the

jury as to the definition of the term "merchandise".

That term was statutorily defined in Title 19 U.S.C. Section 1401 (c) and the appellant respectfully submits that the statutory definition should have been charged to the jury. The government, however, requested additional instruction pertaining to element Number One (1) of the government's requests (that defendant imported or brought merchandise into the U.S.). This instruction allegedly served to 'explain" the term "merchandise" as used in Title 18 U.S.C. Section 545. The government's request stated that Title 19 U.S.C. Section 1202 sets forth the Tariff Schedules of the United States. It then went on to state that since Headnote Number Five (5) of Title 19 U.S.C. Section 1202 provided that ". . . currency (metal or paper) in current circulation in any country and imported for monetary purposes (emphasis supplied)" is an "intangible" and not subject to provisions of Schedules; the issue as to whether or not these coins were "merchandise" depended on "whether or not the coins were imported for monetary purposes."

Defendant-appellant's concern over this instruction was basically threefold: First, while this headnote may have been relevant to government's element Number Two (2) (whether the act was contrary to law) it was not at all relevant to a definition of "merchandise". To so charge this headnote in connection with the definition of merchandise serves to prejudicially determine for the jury that the coins were merchandise in this case so long as they were not imported for "monetary purposes". To base the definition of merchandise on this "standard" alone is to state that such headnote is the exclusive authority for the determination as to when currency is "merchandise". Appellant respectfully submits that instruction should not be given if it lacks evidentiary support or is based upon mere speculation. See United States v. Waskow,

519 F 2d 1345 (8th cir., 1975). Second, to accept said definition of "merchandise" is to modify the specific statutory definition by the "General Headnote and Rules of Interpretation." Customs Regulations cannot be elevated to statutory authority. See Czarni Kow-Rionda Co. v. United States, 468 F. 2d 211 (U.S. Ct. of Customs & Patents Appeals 1972). Furthermore, Congress had provided the statutory definition in Title 19 U.S.C. Section 1401 (c) and the court should not have otherwise constructed that definition. See United States v. C.J. Tower & Sons of Buffalo, Inc., 524 F. 2d 1389 (U.S. Court of Customs & Patent Appeals, 1975). And third, appellant respectfully submits that this headnote also lent nothing to the definition of merchandise since, as the government itself admits on page six of it's Request to charge "there is no special definition of the phrase "monetary purposes" defined either by a statute or case law". Thus, the term is not even defined, and in effect the government's request would replace a statutory definition with a term from a regulation which is not defined. The Second Circuit has recently determined that if more than one instruction is given to the jury and one is erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed and, it constitutes reversible error except where the verdict gives assurances that no prejudice in fact occurred. United States v. Reid, 517 F. 2d 953 (2nd cir. 1975). Certainly this instruction would be prejudicial in that it directed the jury to determine that the currency be used for "monetary purposes" even though it had previously given the statutory 19 U.S.C. 1401 (c) definition as well.

On May 20, 1976 counsel for defendant-appellant orally renewed his objections to government's request to charge (TR. 106), however, the court denied the defendant-appellant's requests (TR. 106).

Subsequently, as has been previously denoted the court's actual

charge did place an overbearing emphasis on the "monetary purposes" standard and even went so far as to practically decide for the jury that the money could only have been used "to purchase goods" if it were to be found to be anything other than "merchandise" (TR. 141-142).

Counsel for the defendant again orally excepted to the charge upon the completion of the same (TR. 147-148).

Considering the vital importance of the jury instruction as to the elements of the definition of the term "merchandise", appellant respectfully submits that the courts charge was confusing and extremely prejudicial. Defendant had submitted a memorandum in support of his requests to charge; and had twice renewed his oral objections to the government's charges. There was, therefore substantial evidence tending to prove that the defendant-appellant considered this definition an essential element of the defense. The Second Circuit in recent years has repeatedly cautioned the courts as to the "plain error" of the failure to instruct on an essential element of defendant's case. See United States v. Singleton, 532 F. 2d 199 (2nd cir. 1976); United States v. Barry, 518 F. 2d 342 (2nd cir. 1975); United States v. DeMarco, 488 F. 2d 828 (2nd cir. 1973); United States v. Fields, 466 F. 2d 119 (2nd cir. 1972).

It has further been firmly established that a defendant in a criminal case is entitled to have the jury instructed on any theory of the defense which has some foundation in the evidence. This is true even where the evidence may be weak or insufficient. United States v. Hillsman, 522 F. 2d 454 (7th cir. 1975) cert. denied, 423 U.S. 1035; United States v. Lehman, 468 F. 2d 93 (7th cir. 1972) cert. denied, 409 U.S. 967; United States v. Leach, 427 F. 2d 1107 (1st cir. 1970) cert. denied 400 U.S. 829.

In summary, the appellant respectfully submits that the charge of

the jury and its failure to allow the appellant to have proper requested instructions presenting his theory of the case given to the jury herein was erroneous and prejudicial. The appellant from the start was aware of the essential elements as to the determination by the jury of whether the Canadian coins constituted "merchandise". For the court to have essentially explained the statutory definition of the term "merchandise" in reliance upon its own definition of an undefined term adopted from a"Headnote and Rule of Interpretation of a Tariff Schedule", was highly prejudicial. Counsel for the defendant-appellant excepted to such charge at every possible moment during trial. Appellant now respectfully raises this issue as grounds for reversible error.

CONCLUSION

The appellant respectfully requests that his judgment of conviction be reversed and his sentence vacated.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

RE: U.S.A. vs George Edward MacIntyre

No. 76-1445

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 10th day of December, 19 76 I mailed _____ copies of a printed Brief & ___ in Appendix the above case, in a sealed, postpaid wrapper, to:

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at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Siegel, McGee, Kelleher, Hirschorn & Kunley Att: Dennis Kahn, Esq.

426 Franklin Street, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

10th day of December, 19 76

Patricia A. Lacey

NOTARY PUBLIC, Genesee County
My Commission Expires March 30, 1977